

No. 80-796

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ZICARELLI,

Petitioner,

vs.

CHRISTOPHER DIETZ, Chairman, New Jersey Parole
Board, and SALLY G. CARROLL, Associate Member,
New Jersey Parole Board,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF IN OPPOSITION

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Opinion Below

The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit appear in Petitioner's Appendix. (1A-36A)

Jurisdiction

This Court has jurisdiction of the instant petition under Title 28, United States Code, Section 1254(1).

Constitutional Provisions Involved

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statement of the Case

The indictments here involved (SGJ2-70-8E and SGJ2-70-8H) were two in a series of seven indictments (SGJ2-69-2 and SGJ2-70-A to D) returned by a state grand jury between November, 1969 and November, 1970.* The indictments which led to the convictions presently under review charged petitioner, Joseph A. Zicarelli and others, with conspiracy to corrupt a public official, and with the substantive offenses of bribery of a public official and corruptly aiding, abetting and causing the payment of

* This grand jury had statewide investigative jurisdiction pursuant to N.J.S.A. 2A:73A-1 to 9.

bribes. The crimes set forth in the pertinent indictments occurred in Hudson County and "elsewhere," although the particular acts they referred to were claimed to have taken place in Hudson County alone.

Of the seven indictments, the venue of the first (SGJ2-69-2) was initially laid in Hudson County. Venue on the next five returned (SGJ2-70-8A, 8B, 8C, 8D, and 8E) was originally laid in Mercer County. The Attorney General of New Jersey subsequently filed an *ex parte* petition with the Honorable Frank J. Kingfield, A.J.S.C., seeking to move the trial on the first indictment from Hudson to Mercer County where the other five had been allocated. An order effecting that change was entered without notice to defendant on June 23, 1970.

Subsequent to that transfer of venue, and before the seventh indictment had been returned (SGJ2-70-H), the Attorney General filed another *ex parte* petition on October 9, 1970, seeking to transfer the six indictments to Burlington County. Three grounds were asserted in support of the petition: (1) petitioner was incarcerated in Burlington County, (2) the prosecution required protection of its principal witness whose personal safety was in danger and security arrangements could adequately be made in Burlington County, and (3) all six indictments involved common questions of law and fact that could best be disposed of by a single judge. Again, without notice to petitioner Judge Kingfield entered an order reallocating the indictments to Burlington County. On November 4, 1970, the final indictment was returned (SGJ2-70-8H) and Judge Kingfield designated Burlington County as the venue for trial.

On January 8, 1971, petitioner moved before the Honorable J. Gilbert Van Sciver, Jr., J.C.C., to whom the cases had been assigned for trial, for an order redesignat-

ing venue in Hudson County. The motion was denied. Leave to appeal was sought from, and denied by, the Appellate Division. Further appeal was sought from, and denied by, the Appellate Division. Further appeal, by way of certification, was then sought from the New Jersey Supreme Court which remanded the matter to the original assignment judge, Judge Kingfield, in order to provide defendant an opportunity to be heard on the matter of venue.

On March 9, 1971, Judge Kingfield, after a full hearing, denied petitioner's application, holding that Burlington was a proper county for purposes of venue. Among the reasons set forth were that, (1) the security of the State's witness could be best assured in Burlington; (2) the Sixth Amendment did not prohibit the laying of venue in Burlington County; (3) there would be less publicity in Burlington County than in Hudson County; (4) there would be an impartial jury in Burlington County that would give petitioner a fair trial.*

Successive trials on Indictments No. SGJ2-70-H and SGJ2-70-E were then held in Burlington County before juries drawn exclusively from that county. On Indictment No. SGJ2-70-H, petitioner was convicted of one count of conspiracy and six counts of aiding and abetting the bribery of a public official. On April 23, 1971, he was sentenced to a term of 12 to 15 years. This conviction was affirmed by the Appellate Division in *State v. Zicarelli*, 122 N.J. Super. 225 (App. Div. 1973), certif. den. 63 N.J. 252 (1973).

* The aforementioned reasons justifying the transfer to Burlington County gleaned from the decisions in *State v. Zicarelli*, 122 N.J. Super. 225, 232-233 (App. Div. 1973) and *Zicarelli v. Gray*, 543 F.2d 466, 469 (3 Cir. 1976).

On Indictment No. SGJ2-70-8E, petitioner was convicted of two counts of aiding and abetting the bribery of a public official and on March 17, 1972, was sentenced to a term of four to five years, to be served concurrently with the sentence imposed on Indictment No. SGJ2-70-H. Petitioner was also convicted of one count of conspiracy but on appeal it was held that the conspiracy conviction was barred by double jeopardy. The Appellate Division also ordered a new trial on the substantive counts. *State v. Louf*, 126 N.J. Super. 321 (App. Div. 1973). The substantive count convictions were ultimately upheld by the New Jersey Supreme Court. *State v. Louf*, 64 N.J. 172 (1973).

Petitioner subsequently petitioned the United States District Court for the District of New Jersey for a writ of habeas corpus. The petition alleged, *inter alia*, that petitioner's constitutional rights were violated when he was tried by a jury selected from residents of a county other than the one in which the crimes were committed, and that he was denied the right to trial by a jury comprising of representative cross-section of the locale where the crimes took place. On December 11, 1974, the Honorable George Barlow, U.S.D.C.J., issued an order adopting Magistrate John Devine's recommendation that the petition for habeas corpus relief be denied.

On November 18, 1975, a three judge panel of the United States Court of Appeals for the Third Circuit reversed the District Court's judgment, and remanded the case with the instruction that the writ should issue unless the State granted defendant a new trial before a jury selected in accordance with the guidelines set forth by Judge Van Dusen in the panel discussion. Although the panel found that defendant's trial conformed to the requirements that the jury be chosen from the "district wherein the crime shall have been committed" (vicinage), it nevertheless held

that the jury venires, excluding the area where the crime occurred, did not represent a cross-section of that community.

The State of New Jersey then petitioned for a rehearing before the Court *en banc*. Petitioner reiterated the contentions raised in his petition for a writ of habeas corpus, namely (1) that the trial before a jury drawn from Burlington County violated his right to be tried by a jury composed of residents of the county where the crime was committed and (2) the procedures employed by the State in assembling the jury violated the cross-section concept of the Sixth Amendment. A third proposition, raised for the first time during oral argument before the *en banc* Court, was that the "district" from which the trial jury was chosen was not "previously ascertained by law," as required by the Sixth Amendment. *Zicarelli v. Gray*, *supra* 543 F.2d at 470.

After full consideration of the questions presented, the *en banc* Court held that petitioner's federal constitutional right to have a jury drawn from the "State and district wherein the crime was committed" was not transgressed when the State tried him before a jury drawn from Burlington County on charges of criminal activity that had occurred in Hudson County. 543 F.2d at 482. It also held that defendant did not exhaust his state remedies as to the cross-section claim which was not argued in the state courts. The *en banc* Court therefore vacated the panel decision and dismissed the writ without prejudice to defendant to pursue his cross-section and previously-ascertained-by-law claims in the State courts. 543 F.2d at 482.

On October 28, 1976, petitioner filed an application for post-conviction relief in the Superior Court, Law Division, claiming that his trial in Burlington County with

a jury drawn exclusively from that county violated his Sixth Amendment rights (1) to a jury selected in such a manner as to insure a fair possibility for obtaining a representative cross-section of the community where the crime occurred, and (2) to a trial in a district "previously ascertained by law." After argument before the Honorable Alexander C. Wood, III, J.S.C., on December 22, 1976, the petition was denied. A Notice of Appeal was filed on January 17, 1977.

On November 18, 1977, the Appellate Division of the Superior Court of New Jersey affirmed Judge Wood's denial of the petition for post-conviction relief. *State v. Zicarelli*, 154 N.J. Super. 346 (App. Div. 1977).

Notice of Petition for Certification to the Supreme Court of New Jersey was filed on December 5, 1977. Petitioner's petition was denied on January 31, 1978. *State v. Zicarelli*, 74 N.J. 284 (1978).

On April 10, 1978 petitioner filed the instant petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. The petition was denied by the Honorable Clarkson S. Fisher, U.S.D.J. by order of April 12, 1979. A certificate of probable cause was issued by the Court of Appeals for the Third Circuit on June 6, 1979.

On September 9, 1980 the Court of Appeals for the Third Circuit affirmed the judgment of the District Court, rejecting petitioner's claims on "the previously ascertained by law" clause and fair cross section grounds.

**REASONS FOR DENYING THE PETITIONER'S
REQUEST FOR A WRIT OF CERTIORARI**

POINT I

The United States Court of Appeals for the Third Circuit correctly interpreted the “previously ascertained by law” clause of the Sixth Amendment in holding that petitioner’s trial in a county other than that in which the crime was committed was constitutionally proper.

The United States Court of Appeals for the Third Circuit rejected petitioner’s “previously ascertained by law” claim not only on the ground of “the patent inapplicability to the States of the language of the “previously ascertained by law” clause applying as it does only to a ‘district’” (19A) which the court held to refer to a Federal judicial district, 543 F. 2d 477 n. 59, but also on the ground that in view of the historical antecedents of the provision, its applicability to the states was not warranted in light of reason and reflection.

Although the available history and precedent concerning the “previously ascertained by law” clause are somewhat sketchy, it seems rooted in reaction to the English practice of removing prisoners for trial to England or elsewhere. The “previously ascertained by law” clause can thus be seen to be an added guarantee that the districts in the “State and district” clause designed to prohibit the English practice would not be readjusted by the Congress *ex post facto* to meet the circumstances of a particular case. *U.S. v. Dawson*, 56 U.S. 468, (1853). The Court below noted:

Viewed in this light, there would be no reason to apply such a clause to the States, who have no

role in establishing or redistricting of Federal judicial districts. Although the geographic distances may be large, they are not comparable to the stretch from the colonies to England, nor the potential distance from one judicial district to a non-contiguous one in the United States.

The Court below went on to note that none of the original states provided for previously ascertained districts or counties in their constitutions when providing for the constitutional right to a jury trial. Only three of the fifty states have a provision in their constitution comparable to the "previously ascertained by law" clause. The Court below thus distinguished the right to have one's jury drawn from a previously ascertained geographic area and other rights which have been held applicable to state trials. It declined to find this right as "of the very essence of a scheme of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319 (1937) and applicable to state criminal trials.

Even assuming *arguendo* the applicability of the "previously ascertained by law" clause to the states, defendant suffered no constitutional violation when he was tried in Burlington County. The New Jersey State Grand Jury Act (N.J.S.A. 2A:73A-1 *et seq.*) created a statewide district for all actions brought as a result of a state grand jury's action. As New Jersey originally constituted and remains a single congressionally created Federal judicial district, the State Legislature has delimited the outer boundaries of vicinage consistent with Federal constitutional and statutory standards. The delegation of venue choice to the assignment judge under this statute (N.J.S.A. 2A:73A-2,8) has not transgressed the constitutional guarantee that a defendant be tried in a district "previously ascer-

tained by law." The State practice in the instant case of authorizing the assignment judge to assign an indictment to be tried in a county other than that in which the offense occurred, is completely analogous to the factual situation in *U.S. v. Florence*, 456 F.2d 46 (4 Cir. 1972) in which the Fourth Circuit rejected the claim that the Sixth Amendment precluded appellant's trial in a division of a Federal judicial district other than where the offense had occurred and where appellant had been a lifelong resident.

The concern noted in the dissent regarding the potential manipulating the boundaries of districts after the events is thus misplaced. As noted above, the concern of the Sixth Amendment was with the manipulation of judicial districts by the legislature. The instant case involved no such legislative manipulation. Rather, in accordance with the *de novo* hearing granted by the New Jersey Supreme Court, the instant case involved a determination by a neutral magistrate, in a proceeding in which defendant had full opportunity to be heard on the question of venue. This procedure is precisely analogous to that sanctioned under the Federal Rules of Criminal Procedure in *U.S. v. Florence*, *supra*.

Allowing for the case, as in the instant case, where there may be compelling reasons why venue should be laid in a county other than that in which the offense occurred, the State Legislature has merely left to the judiciary the designation of the place of trial within the statewide district as a matter of procedural and administrative detail. Contrary to the suggestion in the dissent below that no reasons of policy were put forward by the State in support of this provision, the reasons advanced by the State below in the instant matter are illustrative; security of witnesses; securing an impartial jury free of the influence of

publicity surrounding the offense and the availability and efficient use of judicial resources.

Since the State Legislature has made the "district" for prosecutions emanating from the State Grand Jury coterminous with the Federal judicial district, and as New Jersey remains a single Federal judicial district, the place fixed for trial in the instant case was necessarily "previously ascertained by law." Therefore, whether the definition of "district" is to be taken from State or Federal law, it is evident that the "previously ascertained by law" requirement was honored in this case and petitioner's claim must be denied.

POINT II

Petitioner was tried by a jury drawn from a venire representing a fair cross-section of the community.

The Sixth amendment does not by its terms include a right to trial by a jury drawn from a fair cross-section of the community but in cases where persons have been systematically excluded from juries on the basis of race and gender, this Court has held that the fair cross-section requirement is implicit in the Sixth Amendment. *Taylor v. Louisiana*, 419 U.S. 522 (1975) *Peters v. Kiff*, 407 U.S. 493 (1972); See *Williams v. Florida*, 399 U.S. 78 (1970). The concept of a representative jury has grown from its original articulation in the context of a black defendant's challenge to the systematic exclusion of black persons from his grand and petit juries, *Smith v. Texas*, 311 U.S. 128 (1940), to the broader principle that any defendant may challenge the arbitrary exclusion from jury service of his own or any class. *Glasser v. United States*, 315 U.S. 60 (1942); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1940); *Ballard v. United States*, 329 U.S. 187 (1940).

This development, however, has occurred in the context of the exclusion of groups differentiated by race, sex and social or economic class. With only rare exception, based on unique factual circumstances, *Alvarado v. State*, 486 P. 2d 891 (Alaska 1971), this development of the principle of a representative jury has not been extended to groups based on geography. *United States v. Butera*, 420 F. 2d 564 (1st Cir. 1970). The rationale underlying this development has been the "manifestly higher cohesion of interest among (members of groups defined by race, gender and social or) economic class than among those brought together by the mere coincidence of the geographic unit where they live." 10a

The instant case is illustrative. The demographic data concerning Hudson County, the county in which the offense occurred and Burlington County, the county in which the offenses were tried, set forth at pages ten to twelve of the petition, merely show that "in ordinary parlance, (Burlington would) be more rural, while Hudson would be categorized as more industrial. Acknowledgement of such difference hardly foretokens that the differences are of constitutional significance" 9a. Petitioner does not contend that any identifiable segment of the community was excluded by virtue of the venues being laid in Burlington County. The data advanced by petitioner fails to show that any identifiable group is unrepresented in Burlington County or that there is such a gross disproportionate representation of an identifiable group as to be tantamount to exclusion. Hence, the court below was correct in concluding that "the demographic difference shown by Zicarelli between Burlington and Hudson counties are not sufficiently substantial in terms of the characteristics which foster group identification" 17a, to support petitioner's claim that his trial violated the cross-section requirement of the Sixth Amendment.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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